Te Tari Ture o te Karauna
Crown Law

Decisions to prosecute

Te whakatau ki te aru

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. If a prosecuting agency has decided, in accordance with its prosecution policy, that prosecution should be considered, it should apply the Test for Prosecution.

2. There are two stages to the test:

   2.1 The first stage is the Evidential Test: Is there enough evidence to prove the proposed charge beyond reasonable doubt?

   2.2 The second stage is the Public Interest Test: Does the public interest require a prosecution to be brought?

3. Prosecutors should only commence a prosecution if both tests are met, and they should apply the tests separately for each charge they wish to bring. Prosecutors should never commence a prosecution if there is not enough evidence to prove a charge, no matter how strong the public interest in prosecution may be. Conversely, even where there is overwhelming evidence to prove the charge, prosecutors should not bring a prosecution unless the public interest requires it.

4. The tests should generally be applied in the above sequence, with the Evidential Test considered first. However, if the prosecutor is of the clear view that a prosecution is not required in the public interest, a decision can be made on that basis without the need to comprehensively evaluate evidential sufficiency.

Roles | Ngā tūnga

5. This guideline refers to the "prosecutor" as the decision-maker. In practice, the initial prosecution decision in many agencies is likely to be made by an investigator where it is not practical or expedient for a prosecutor to do so. Investigators may not be in a position to take into account all the factors set out in the guidelines, but their decisions should be reviewed by a prosecutor, who will be better placed to do so, at a later date.

6. The prosecutor's role is to make decisions based on the evidence and information available to them. While this guideline recommends prosecutors take into account a wide range of information in making prosecution decisions, that is limited to information the prosecutor is personally aware of at the time of making the decision. Prosecutors are not expected to make further enquiries about matters such as a suspect's personal background and circumstances. Prosecutors should review the decision to prosecute when they receive material new information.

Guideline | Te aratohu

Evidential Test

7. The prosecutor should be satisfied there is sufficient evidence to prove the charge beyond reasonable doubt.

8. Where there is an obvious defence that is likely to be raised (such as self-defence) the prosecutor should also consider whether it is, or may be, satisfied on the evidence. While in general the question of defences should be left to the court, the Evidential Test will not be made out if an anticipated or clearly available defence cannot be rebutted to the requisite standard on the evidence.

9. In assessing whether the Evidential Test is met, the prosecutor should consider all the available evidence, including exculpatory evidence. However, there are some types of evidence that should either be excluded from consideration or should be treated with care, to ensure that the evidence founding the prosecution is **available**, **admissible**, **credible**, and **reliable**.

Availability

10. Only evidence which is actually available to the prosecutor to adduce in court should be considered.

Commentary

For example, if a key witness is known to be overseas, the prosecutor should be satisfied that their evidence is able to be secured. The prosecutor might, for example, know the witness is willing to voluntarily return to New Zealand to give evidence or their evidence can be obtained in some other way (such as by video link).

11. It is not necessary for all the evidence to be in admissible form at this stage.

Commentary

For example, where documentary evidence is to be admitted as a business record the prosecutor need only be satisfied that there will be a witness available to produce it, it is not necessary to have obtained a formal statement from that person. Results of scientific testing may also be taken into account before a formal report or statement has been prepared.

Admissibility

12. Only evidence which is reasonably expected to be admissible should be considered. This may include evidence which is prima facie inadmissible, such as hearsay, if the prosecutor reasonably believes a court will admit it. But it should not include evidence which is plainly inadmissible or where the argument for admissibility is weak.

Commentary

For example, a prosecutor may reasonably believe the court will admit a hearsay statement where the maker of the statement is deceased, or there is some other rule under which the evidence could be admitted such as the co-conspirator's rule. Similarly, a prosecutor may reasonably believe that, even where there appears to have been some irregularity that means the evidence has been obtained improperly or unfairly, the court is unlikely to exclude it under s 30 of the Evidence Act 2006.

Credibility

13. In general, credibility findings should be reserved for the court. However, only evidence that is capable of belief should be considered. The prosecutor should consider each piece of evidence against the other available evidence to determine whether it is capable of belief. If a piece of evidence is clearly contradicted by the weight of other evidence, or there is some other factor suggesting the evidence is not credible, it should be discounted. Prosecutors should ensure that any reasonable further enquiries which might assist a court in making credibility assessments have been carried out.

Commentary

Prosecutors may conclude a witness's evidence is not credible, and should not be taken into account, where the weight of other evidence (or some other factor) establishes that account is false or inaccurate. But a prosecutor should not exclude evidence from consideration simply because there is contradictory evidence (such as an account in a suspect's Police interview) or because the witness's credibility is likely to be challenged in court. There may be a reasonable explanation for contradictory evidence, particularly where an offence is committed in private and there are no eyewitnesses or other corroborating evidence (for instance, in family or sexual violence offending). Provided the victim's account is capable of belief, it is for the court, not the investigator or prosecutor, to assess the credibility of the evidence before them.

Reliability

14. Prosecutors should be satisfied the evidence is reliable.

15. Prosecutors should take particular care with a defendant's statements that will be relied on as admissions. The prosecutor should be satisfied such statements have been obtained properly and fairly, and that they are reliable, before taking them into account. Where a defendant has allegedly made an admission to a witness other than an investigator or some other person acting in an official capacity, the prosecutor should consider the possibility that the witness is either mistaken or has a motivation to falsely attribute an admission to the defendant. Where the admissions were not contemporaneously recorded, the prosecutor should consider the possibility there may have been some error in recall. Where alleged admissions have been made in a custodial environment, the prosecutor should analyse the statements in accordance with the guideline on Inmate admissions | Ngā whāki ā-mauhere.

Applying the test to the evidence

16. When assessing availability, admissibility, credibility and reliability, the prosecutor should consider asking the investigator to make further enquiries about a piece of evidence if there is any doubt about whether it should be relied upon.

17. For the avoidance of doubt, evidence which has been excluded from consideration for the purposes of the Evidential Test may still be used at trial to supplement the prosecution case. There may be pieces of evidence where there is a question about credibility which is properly left to the fact-finder to determine, but the prosecutor decides to exclude that evidence from consideration when applying the Evidential Test. It is important that the Evidential Test is made out based on evidence the prosecutor is confident is available, admissible, credible and reliable before a prosecution can be commenced.

18. The evaluation of the admissible evidence, and the assessment as to whether it is sufficient to prove the charge beyond reasonable doubt, is a matter of judgement rather than science. Prosecutors should anticipate likely defences and critically analyse the evidence on that basis. They should consider how a court might view particular pieces of evidence, based on their experience, and consider the significance of that. But they should not attempt to predict the outcome of a trial. In particular, prosecutors should not allow the prospect of illegitimate reasoning by the fact-finder to factor into their assessment of evidential sufficiency. This is particularly likely to be an issue in cases involving sexual violence or family violence, where a victim may be perceived to have behaved in a counter-intuitive way.

Public Interest Test

19. The prosecutor should be satisfied the public interest requires a prosecution to be brought.

The "public interest" is not the same as the "interests of justice"

20. The terms "public interest" and "interests of justice" are commonly used in the criminal jurisdiction. At times they may appear to be interchangeable, but in the guidelines they are distinct concepts.

21. The guidelines use the term "interests of justice" where the focus is on what will do justice in an individual case, and it is not necessary for the prosecutor to look beyond the circumstances of the particular case.

22. By contrast, the "public interest" imports broader notions of justice and fairness and will take into account factors beyond the case at hand, which ensure a fair and credible justice system. There is a strong public interest in holding offenders to account. Upholding the rights of those who are accused of offences is also in the public interest.

Commentary

For example, there is a strong public interest in upholding plea arrangements. But it may be in the interests of justice to rescind a plea arrangement in a specific case where new evidence has come to light. As another example, in the aftermath of a natural disaster the public interest may not support the bringing of prosecutions which would ordinarily be in the interests of justice, because the courts are not able to operate at full capacity.

Applying the Public Interest Test

23. It has never been the rule that all offences must be prosecuted. Even if the Evidential Test is satisfied, it is a matter of prosecutorial judgement whether to bring a prosecution. Each prosecuting agency will exercise its judgement in accordance with its own enforcement objectives and priorities, while taking its available resources and the likely costs of a prosecution into account.

24. The ultimate question is whether the public interest requires a prosecution as a response to the offending. The guidelines require that question to be considered at two points:

    24.1 The first is in the application of the agency's prosecution policy as set out in the guideline on Prosecution policies | Ngā kaupapa here mō te aru: if the prosecuting agency considers some alternative method of responding to the offending is available and appropriate; can effectively respond to the offending; and meet the needs of victims, their whānau and the broader community, then prosecution does not need to be considered.

    24.2 The second is after the prosecutor has determined the Evidential Test has been met: prosecution should not be the default response. For example, the suspect may deny the offending (which may disqualify many of the alternative methods of dealing with the matter), in a case where the offending is at the lower end of the scale in terms of seriousness and does not require a prosecution.

25. When considering the likely costs of a prosecution, prosecuting agencies should bear in mind that when they commence a prosecution, they do not incur costs only for the parties (the prosecuting agency and the defendant). Prosecutions require time and resources to be spent by the courts and other agencies, as well as other affected persons (for example, victims and their whānau). In considering whether the public interest requires a prosecution, prosecutors should consider the fact that, if a prosecution is brought, there will be costs to the system as a whole, not just their agency. This is separate, and additional, to considering the impacts of the offending itself on the participants (which is a component of the Public Interest Test as outlined below).

26. Prosecuting agencies are only expected to anticipate the ordinary costs of a prosecution. There may be cases where a well-resourced defendant takes steps in the prosecution process which cause delays or otherwise inflate the costs of the prosecution. It may be reasonable for an agency to persist with a high-cost prosecution when that is in the public interest, even if the offending is not particularly serious. This is particularly relevant for regulatory prosecutions.

Factors to be considered

27. The list of factors set out below is not intended to be exhaustive. A particular case, or a particular type of offending, may have features which are uncommon but are relevant to the public interest. The guidelines attempt to highlight the public interest factors which are most commonly applicable but, particularly in the regulatory context, prosecuting agencies may consider other factors to be relevant. Those factors should be set out in the agency's prosecution policy with an explanation of how they may weigh in favour of, or against, a prosecution. The guideline on Making unbiased decisions | Te whakatau rītaha-kore may also assist in making these assessments.

28. In general, prosecutors should consider four broad questions when assessing whether the public interest requires prosecution:

    28.1 How do the features of the **offending** weigh for or against prosecution?

    28.2 How do the personal characteristics and circumstances of the **suspect** weigh for or against prosecution?

    28.3 How do the interests of the **victim(s)** (if there are any) weigh for or against prosecution?

    28.4 Are there any **alternative methods** of resolving the matter short of prosecution which are available and appropriate in the circumstances?

The offending

29. How do the features of the offending weigh for or against prosecution? This will likely require an assessment of:

    29.1 the seriousness of the offending;

    29.2 the individual suspect's involvement and level of culpability;

    29.3 whether there is a particular need to deter that type of offending;

    29.4 whether the likely sentence that would be imposed on conviction would only be minor; and

    29.5 whether there are any national security concerns.

30. Different types of offending will naturally require consideration of different factors. As set out above, a prosecuting agency which focuses on a particular type of regulatory offending, for example, may produce its own list of factors to be considered which should be set out in its prosecution policy.

31. Any assessment of the seriousness of the offence will necessarily be context specific. The extent of harm to any victim or communities is an important consideration. Offending which does not involve actual harm to the public or an individual may nevertheless be considered a serious example of its kind.

32. That is particularly relevant in the regulatory context, for example where there has been a breach of provisions designed to protect the integrity of New Zealand's primary industries, critical infrastructure, financial markets, environment and so on, as opposed to provisions which target public safety more directly.

Commentary

There may be objective indicators as to the seriousness of the offence, such as the prescribed maximum penalty. However, prosecutors should be careful not to assume offending is particularly serious simply because the offence charged carries a high maximum penalty: a case-specific assessment is required. Conversely, offending which is not subject to a high maximum penalty may still be considered serious. In some cases, prosecutors may choose to consult with interested parties to assist in their assessment. For example, in fisheries prosecutions, tikanga considerations may be relevant. In such a case it may be valuable to seek the views of interested whānau, hapū and/or iwi.

33. It is not possible to list all the factors which may be relevant to an assessment of seriousness. Prosecuting agencies, particularly those dealing with only a narrow scope of conduct, should identify in their prosecution policies the way in which seriousness will be assessed and the factors which may be relevant. Without limiting the matters which may be relevant to an assessment of seriousness, any matter identified as an aggravating factor in the Sentencing Act 2002 will be relevant as well as those listed above.

34. Offences dealing with breaches of statutory or court-ordered conditions (such as sentence or release conditions) require careful consideration in some situations, such as where the offender is grappling with mental health or addiction challenges which may mean that they have genuine difficulty complying with such conditions. Prosecutors should be aware that prosecuting every breach of such conditions, where an offender's culpability is lowered because of a reduced ability to comply, may simply lead to the offender accumulating multiple convictions for breach offences. This may actively inhibit their rehabilitation and reintegration, and consequently increase the risk of further offending.

35. Where an offender appears to have breached the conditions of their sentence or release, prosecutors should first consider which of the following is the most appropriate approach in the circumstances of the case:

    35.1 An educative approach, which involves ensuring the offender is aware of their obligations and warning them of the possible consequences of a breach.

    35.2 An administrative approach, for example seeking a review or cancellation of the sentence, resulting in a re-sentencing (in the case of a breach of sentence conditions), or recall to prison (in the case of a breach of release conditions).

35.3 Prosecution, which may be appropriate where it is apparent the breaches in question have been repeated and deliberate. Prosecution may also be appropriate where the breaches undermine efforts to protect a person's safety, such as breaches of non-association conditions. In other cases, if an educative or administrative approach is to be taken, the offender should not generally be prosecuted for the breach as well.

The suspect

36. How do the personal characteristics and circumstances of the suspect weigh for or against prosecution? This will likely require an assessment of the following factors:

36.1 The suspect's age (prosecution may have a disproportionate impact on both the young and the elderly). Age will likely also be relevant to the risk of reoffending.

36.2 Whether the suspect has any disability or is experiencing any significant mental health issues, which may have had a causative role in the offending, that the prosecutor is aware of.

36.3 The suspect's prior criminal history (or lack of), including prior enforcement action short of prosecution if the prosecutor is aware of it.

36.4 The risk posed by the suspect to the safety of the public, or any individual person.

36.5 Whether there are features of the suspect's background known to the prosecutor which may shed light on a suspect's culpability or have played a role in their offending.[1] As with all public interest factors, this is not a determinative factor on its own and is likely to be most relevant in cases involving less serious offending or where the decision to prosecute is finely balanced. It will often be the case that prosecution remains appropriate and such matters are best taken into account in the sentencing exercise.

36.6 Whether the suspect has already been subject to some consequence for their conduct, such as:

36.6.1 loss or harm arising from the offending itself (the suspect may have been harmed themselves or have unintentionally harmed someone close to them);

36.6.2 post-conduct loss or harm, whether related to the offending or not (the suspect's present personal circumstances may be quite different from those prevailing at the time of the offending); or

36.6.3 legal consequences, such as employment consequences or action taken by another agency.

36.7 Any other aggravating features, such as being subject to a sentence, or bail or release conditions, at the time of the offending. It may also be relevant that the suspect was subject to some non-judicial proceedings or order (such as

[1] *Berkland v R* [2022] 1 NZLR 509. For example, relevant factors may relate to poverty, a lack of education opportunities, addiction or displacement from whānau or community support. In addition, offenders may have previously been victims of crime (whether reported or not) and that may be a relevant factor in their own offending.

disciplinary proceedings), particularly in the context of regulatory offending.

36.8 Any other mitigating features, such as:

36.8.1 expressions of remorse;

36.8.2 participation in restorative practices, whether formal (such as restorative justice conferences), or informal (such as initiatives led by local communities, iwi or hapū);

36.8.3 the provision of assistance to the authorities; or

36.8.4 efforts to repair damage or restore losses.

37. Prosecutors are only required to take into account a suspect's personal characteristics where there are reasonable grounds to believe they are applicable and relevant. Prosecutors will use their judgement to determine whether and how to take such matters into account, based on the information available to them.

Commentary
For example, it will not always be appropriate to take an assertion that a suspect has a mental or intellectual impairment at face value, particularly where there has been no formal diagnosis. Another example might be where there has been an expression of remorse which does not appear to be genuine.

38. Particular care should be taken with certain classes of offender:

38.1 Young people and first offenders. Entry into the criminal justice system has been proven to have long-term negative impacts for a defendant, even if they are not convicted. The fact a person has been charged (and may be subject to bail conditions) can make it more difficult to retain employment and housing. Where the offending is not serious, those who do not have any prior convictions (and therefore may be disproportionately impacted by a decision to bring a prosecution) should be dealt with in an alternative manner if possible.

38.2 People with a mental or intellectual impairment. A prosecutor may be aware (for example, from prior dealings with the person) that a suspect has a mental or intellectual impairment (whether due to injury or some other cause such as Fetal Alcohol Syndrome Disorder) or is experiencing significant mental health issues. Those circumstances can be relevant to the prosecution decision in two ways. First, if there is a causal link between those matters and the offending, the suspect may be less culpable. Second, the suspect may not be able to fully participate in a criminal proceeding. That may require prosecutors to consider whether an alternative intervention or response (such as action under the Mental Health (Compulsory Assessment and Treatment) Act 1992) would be more appropriate. Or, if there is to be a prosecution, the prosecutor may need to suggest the court order reports to be prepared under the Criminal Procedure (Mentally Impaired Persons) Act 2003. There will be cases in which prosecution is appropriate despite these issues, for example where the offending is serious or there are public safety concerns. In such cases the defendant's circumstances can be taken into account at sentencing.

39. Prosecutors will usually be unaware of the full extent of a defendant's personal circumstances at the time they make the initial prosecution decision. Prosecution decisions should be reviewed whenever significant new information about the defendant comes to light.

40. Different considerations arise where the offender is a corporate entity rather than a natural person. Prosecuting agencies who regularly investigate the conduct of corporate entities should set out in their prosecution policies the factors to take into account in determining whether a prosecution is appropriate, tailored to the type of conduct in question.

Commentary

For example, while in general the courts are reluctant to impose significant monetary penalties on a natural person who does not have the means to pay, the same is not true of corporate defendants where the threat of significant financial penalties, even to the point of liquidation, is an effective deterrent.

The victim

41. How do the interests of the victim(s) (if there are any) weigh for or against prosecution? This will likely require an assessment of:

    41.1 any ongoing safety issues for the victim, their whānau and the community;

    41.2 the impact of a prosecution, or decision not to prosecute, on the victim's physical and mental health;

    41.3 the impact of a prosecution, or decision not to prosecute, on the victim's whānau and, where relevant, their hapū and iwi;

    41.4 how the victim's ability to obtain reparation will be affected; and

    41.5 whether the victim will be eligible for registration on the Victim Notification Register.

42. It should never be assumed that a victim would wish to avoid being involved in a trial. Some will feel that way. Others see their choice to be involved in a prosecution, despite its challenges, as an important step to hold the defendant accountable.

43. Prosecutors may seek the views of a victim before making a decision to prosecute or not, particularly in family violence or sexual violence cases where the victim's evidence is central to the prosecution and the decision will have significant implications for them. However, it should always be made clear that the decision is for the prosecutor to make; the victim's views will not be determinative. If a prosecutor asks a victim whether they support a prosecution being commenced, they should first inform them:

    43.1 whether they will be required to give evidence;

    43.2 how long a prosecution may take; and

    43.3 of the likelihood of a custodial sentence if the defendant is found guilty (but emphasising this will be a matter for the court to determine).

Commentary

People unfamiliar with the criminal justice system may have unrealistic expectations as to both process and outcome. It is important to ensure victims understand the process before being asked if they support a prosecution. In some cases, prosecutors may also share their assessment of the likelihood of conviction: while there may be sufficient evidence to prove the charge beyond reasonable doubt, the prosecutor may nevertheless consider, based on their judgement and experience, that acquittal is more likely. That, too, *may* influence a victim's views, but that should not be assumed – for some victims the process of holding an offender accountable is more important than the outcome, and of course the prosecutor's prediction may prove to be incorrect. Prosecutors should ask themselves *why* they think a prosecution may not result in a finding of guilt if they consider there is sufficient evidence; if it is because they think the fact-finder will be influenced by irrelevant matters or engage in illegitimate reasoning, they should take steps to mitigate those risks.

44. Where a victim does not support a prosecution and/or does not wish to give evidence, prosecutors should carefully consider why the victim holds that view. The ultimate question is what the public interest requires; there will be cases in which, for reasons of public safety, a prosecution is required despite the victim being unsupportive. Prosecutors should be sensitive to victims' needs in such situations and take steps to allay their concerns.

Commentary

Prosecutors should be aware that the reason a victim does not support a prosecution may in fact reinforce the need for a prosecution, for example, where they are fearful of the defendant. In such cases prosecutors should explain the possibility of applying to the court for an order permitting the victim to give evidence in an alternative way.

45. Further, a victim's views about a prosecution may change over time. Prosecutors should be aware of this and be prepared to seek a victim's views at multiple times and review the prosecution decision if necessary.

Alternatives to prosecution

46. Are there any alternative methods of resolving the matter short of prosecution which are available and appropriate in the circumstances? This question will in many instances have been considered prior to applying the Test for Prosecution, in accordance with the prosecuting agency's prosecution policy as set out in the guideline on Prosecution policies | Ngā kaupapa here mō te aru. However, prosecutors should return to it at this stage when more information will likely be available as circumstances may have changed with the passage of time.

The continuing obligation to review the prosecution decision

47. Once a prosecution is commenced, prosecutors should keep the decision to prosecute under review throughout the life of a case to ensure that it remains appropriate to continue with it and that the charges are correct. In particular, prosecutors should revisit the Test for Prosecution in either of the following scenarios:

    47.1 Where further information or evidence comes to light which either contradicts some of the evidence to be relied upon or otherwise weakens the prosecution

case.

47.2 Where further material information is received, or there is a material change in circumstances, relevant to the factors considered as part of the Public Interest Test.

Commentary
It is a matter of judgement for the prosecutor to decide when to review the decision to prosecute. If a defendant invites the prosecutor to review the decision, whether on the basis of new information or otherwise, it is for the prosecutor to determine whether there has been a material change warranting reconsideration.

48. A prosecution should be discontinued as soon as practicable if the prosecutor considers the Test for Prosecution is no longer met.

49. There will also be cases where the prosecutor considers that, as a result of further evidence becoming available, a charge should be amended (either to a more or less serious charge) or additional charges filed. The court's leave may be required. It is appropriate to take those steps, provided there is no unfairness to a defendant; it would not be fair, for example, to significantly amend charges shortly before a trial is to commence. However, such a step may be necessary in the public interest, in which case the prosecutor should not oppose an application to adjourn the trial so that the defendant can prepare to meet the new charges.

The choice of charges

50. In most cases, the evidence will support charges for more than one offence. The prosecutor will need to decide which charge (or charges) is most appropriate in the circumstances. That should generally be done prior to consideration of the Test for Prosecution, because:

50.1 the prosecutor will need to know what offence is to be charged in order to determine whether the Evidential Test is met; and

50.2 the prosecutor will also need to know what the appropriate charges would be, at least in a general way, in order to gauge the seriousness of the offending, which is relevant to the Public Interest Test.

51. However, prosecutors may determine that a different charge (whether more or less serious than first thought) should be preferred, once the factors in the Public Interest Test have been considered. In such cases it will usually be prudent to reconsider the Evidential Test to ensure that all elements of the charge to be filed can be proven beyond reasonable doubt.

52. Prosecutors do not have to select, or continue with, the most serious charge available on the evidence. Nor must they select the least serious charge which is technically available on the evidence. Prosecutors should proceed with charges that:

52.1 accurately and adequately reflect the seriousness and extent of the offending; and

52.2 provide the court with an appropriate basis for sentencing in light of the facts

and elements of the offence.

Commentary

For example, most offending involving interpersonal violence will involve the defendant unlawfully detaining the victim. But that does not mean that a charge of kidnapping should necessarily be filed. Such a charge should be reserved for cases in which there is a period of deliberate detention as a separate act. In respect of the violence itself, there are often several different charges available. Any charge more serious than assault could technically be charged as assault. It is for the prosecutor to assess which charge best captures the criminality of the offending. Another common example is where there have been multiple assaults in a single episode of violence: it is not generally necessary or appropriate to file a charge for every individual punch or kick. However, separate charges should be preferred if there is a clear delineation between multiple violent acts, such that a fact-finder might reasonably reach different verdicts for each.

53. Prosecutors should never inflate the number or seriousness of charges to encourage a defendant to plead guilty to a lesser charge, or to fewer charges. The Test for Prosecution should be applied to each individual charge the prosecutor wishes to file.

54. Prosecuting agencies and Crown Solicitors should have processes in place for the peer review of charging decisions by a suitably senior prosecutor.

Plea arrangements

55. A plea arrangement is an agreement between the prosecutor and the defendant that the defendant will plead guilty if the prosecutor agrees to do one or more of the following:

    55.1 Reduce a charge to a lesser offence.

    55.2 Not file, withdraw or offer no evidence on other charges.

    55.3 Not file, withdraw or offer no evidence on charge(s) against another person or persons.

    55.4 Amalgamate multiple charges to a single representative charge.

    55.5 Amend content in the summary of facts that will be put before the court.

56. A plea arrangement may also involve a prosecutor agreeing to not file, offer no evidence on, or withdraw charges in exchange for a suspect giving evidence in a trial against other defendants involved in the same set of facts. The existence of such an arrangement should be disclosed to those other defendants.

57. A plea arrangement should **not** include the prosecutor agreeing to support a particular sentence, because the decision as to sentence is exclusively for the court. A prosecutor may give a defendant advance notice of their likely position on sentence, but that should form no part of the plea arrangement.

58. Plea arrangements have several benefits:

    58.1 They provide victims and their whānau with the certainty of an outcome without the need for a trial.

58.2 They will generally result in an outcome being reached much more quickly than if a trial were required. This is a benefit for both the victim(s) (if any) and the defendant.

58.3 There are significant savings in resources if the time and cost of a trial are not required.

Commentary
Those benefits go beyond the individual case: the court time that would have been used for that trial can be used for another trial instead, providing a quicker outcome for the participants in that case as well.

58.4 Victims and other witnesses who may have found the experience of giving evidence traumatic will not be required to do so.

59. Plea discussions, whether or not they result in a plea arrangement, are a legitimate way of efficiently and effectively progressing a prosecution when done in a principled way. They may be initiated by either the prosecutor or the defendant, at any time during the prosecution.

60. Prosecutors should engage in plea discussions with defence counsel. They should not generally engage directly with a defendant, whether they are represented by counsel or are representing themselves (see the guideline on Self-represented defendants | Te kaiwawao ka whakakanohi i a ia anō for more guidance in that situation).

61. Prosecutors may enter into a plea arrangement if it is in the interests of justice. This requires that the charges to which the defendant will plead guilty:

61.1 are clearly supported by the evidence;

61.2 adequately reflect the essential criminality of the conduct; and

61.3 provide an adequate basis for an appropriate sentence.

62. Prosecutors should not enter into a plea arrangement where the plea arrangement would produce a distortion of facts or create an artificial basis for sentencing.

63. If a prosecutor is considering entering into a plea arrangement in a case involving a victim of a specified offence, they should make all reasonable efforts to seek the victim's views on the proposed plea arrangement before it is finally agreed. However, the decision is ultimately one for the prosecutor.

64. Prosecutors should be as consistent as possible in plea discussions with all defendants. Defendants who are comparably situated should be provided with a comparable opportunity to engage in plea discussions and be treated similarly in the discussions.

Commentary
This paragraph applies more broadly than to cases involving multiple defendants. While it is obviously important that multiple defendants in the same case are treated consistently, prosecutors should also be aware that some defendants may not be treated consistently with others in comparable situations as a result of unconscious bias or other factors.

65. Prosecutors should honour plea arrangements. A prosecutor may only depart from an agreed plea arrangement if the interests of justice require it. Either the Crown Solicitor (in a Crown prosecution), or a senior manager within the prosecuting agency (in a non-Crown prosecution) should personally approve the repudiation of a plea arrangement.

Commentary

It will not be sufficient that the prosecutor simply changes their mind. Repudiation of a plea arrangement will generally only be appropriate if the prosecutor becomes aware that the facts of the case are significantly different from those that were understood at the time of entering into it, whether because they have been misled or further information has come to light.

66. If a prosecutor is considering entering into a plea arrangement that involves the defendant pleading guilty to a charge that is significantly less serious than that disclosed by the evidence, removing reference to a material aggravating factor from the summary of facts, or withdrawing charges altogether, the prosecutor should discuss the matter with a senior prosecutor within their agency or firm.

67. If a prosecutor is considering entering into a plea arrangement in a case in which reparation will be sought at sentencing, the prosecutor should review the guideline on Avoiding unlawful bargains | Te kaupare i te tauhokanga takahi ture.

Plea arrangements in cases involving sexual violation

68. Crown Solicitors must personally approve the withdrawal or reduction of a charge of sexual violation, in accordance with the guideline on Prosecuting sexual violence | Te aru i te taitōkai. Crown Solicitors are required to comply with the direction that personal approval be given, in accordance with s 188 of the Criminal Procedure Act 2011.

Plea arrangements in murder cases

69. Crown Solicitors must seek the Solicitor-General's approval for plea arrangements in relation to murder charges, in accordance with the guideline on Plea arrangements in murder cases | Ngā whakaritenga tauākī i ngā kēhi kōhuru. Crown Solicitors are required to comply with the direction that personal approval be given, in accordance with s 188 of the Criminal Procedure Act.

The summary of facts

70. Plea arrangements will often involve discussions about the factual basis for sentencing. Prosecutors should not agree to present a summary of facts that misleads the court. For instance, prosecutors should not:

    70.1 Withhold admissible facts that would be relevant and material to sentencing.

    70.2 Withhold information about the injury or damage suffered by a victim.

    70.3 Include facts that would cause the court to reject a guilty plea (such as facts suggesting the offending may have been accidental when the particular offence requires proof of intention).

Decisions to take no action

71. Decisions not to prosecute must be explained to victims.[2] In serious cases, such as cases involving sexual violation or a death, that should be done in person, if practicable. The guideline on Prosecuting sexual violence | Te aru i te taitōkai provides further guidance for those cases.

72. People should be able to rely on decisions taken by prosecutors. Usually, if a prosecutor tells a suspect or defendant that no action is to be taken, that should be the end of the matter. However, there may be circumstances in which action may need to be taken after an initial decision to take no action, such as:

    72.1 Rare cases where a review of the original decision shows that it should not be allowed to stand.

    72.2 Cases where there is a subsequent and material change in the evidence available.

73. In either situation, the overriding consideration remains whether it is in the public interest to reverse the original decision.

74. There is no statutory right to seek a review of a decision not to prosecute. But victims or interested members of the public may nevertheless seek a review and, in some cases, a prosecuting agency may agree to engage in such a process.

75. All prosecuting agencies should have a policy for dealing with a request to review a decision to take no action in a particular case. Such policies should give effect to principles of natural justice and ensure independence of the review from the original decision.

76. The guideline on Prosecuting sexual violence | Te aru i te taitōkai stipulates the procedure to be followed in cases where a decision is made to take no action where there is an allegation of sexual violation.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Prosecution policies | Ngā kaupapa here mō te aru
Making unbiased decisions | Te whakatau rītaha-kore
Victims | Ngā pārurenga
Prosecuting sexual violence | Te aru i te taitōkai
Plea arrangements in murder cases | Ngā whakaritenga tauākī i ngā kēhi kōhuru
Avoiding unlawful bargains | Te kaupare i te tauhokanga takahi ture
Statutory consents to prosecutions | Ngā whakaaetanga ā-ture ki ngā arumanga
Inmate admissions | Ngā whāki ā-mauhere
Immunities | Te kahu ārai

[2] Victims' Rights Act 2002, s 12(1)(b).